

Asian Appraisal (Malaysia) Sdn. Bhd. were enclosed in the affidavit of the respondents supporting the application in the statement of claim latter mentioned.

We agree with the learned judge that the substance of the objection is the ground first mentioned in both instances i.e. the sale by private tender as conducted by the S.A.R. was not in accord with the consent order which called for sale by private treaty as the first choice.

At page 371 of the Second Edition of that admirable treatise on *Res Judicata* by *Spencer-Bower & Turner* appears the following passage:

"For the purpose of estoppel *per rem judicatum*, . . . , the judicial decision relied upon as creating the estoppel must be shown to have been final in both the senses there indicated: that is to say, there is no estoppel if the judicial decision, as recorded, is imperfect, provisional, indefinite, or ambiguous, or if, though *ex facie* appearing to be final, it is liable, whether at common law, or by statute, to be rescinded, varied, or re-opened by the tribunal which pronounced it."

We are of the view that the decision of the learned judge in dismissing appellants' application to set aside the sale by private tender made by way of summons-in-chambers dated January 1, 1980 satisfies both these requirements of finality and would therefore with respect agree with the learned trial judge that the plea of *res judicata* raised by respondents should succeed.

We would therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *A. Gomez & Co.; Foo Say Ghee & Co.; Dzaidin & Co.*

CHE NOH BIN YACOB v. SENG HIN RUBBER (M) SDN. BHD.

[F.C. (Wan Suleiman F.J., Salleh Abas F.J. & Hashim Yeop A. Sani J.) June 6 & September 17, 1981]
[Kota Bharu — Federal Court Civil Appeal No. 105 of 1980]

Labour Law — Social Security — Employee injured in a factory — Employee a contributor under Employees' Social Security Act, 1969 — Whether barred from receiving or recovering damages under Common Law or any other law — Employees Social Security Act, 1969, ss. 31 & 42.

The appellant claimed damages arising from an accident at a factory of the respondents while appellant was operating a machine. At the trial the respondents raised the preliminary point that section 31 of the Employees Social Security Act, 1969, was a bar to the appellant's claim. It was contended that a contributor under the said Act is barred from receiving or recovering any damages under the common law or any other law for the time being in force. The learned judge held that section 31 of the Act operates as a bar to the claims and he dismissed the claims (see [1980] 2 M.L.J. 264). The appellant appealed.

Held, dismissing the appeal: it is clear that once a person is an insured person under the Act, section 31 and section 42 of the Act constitute a complete bar to any claims against his employer under the common law.

Cases referred to:-

- (1) *Tan Peng Loh v. Lee Aik Fong & Anor.* [1982] 1 M.L.J. 74.
- (2) *Croxford v. Universal Insurance Co. Ltd.* [1936] 2 K.B. 253, 280.

FEDERAL COURT.

- A *Wan Mustapha* for the appellant.
P.C. Royan for the respondent.

Cur. Adv. Vult.

- B **Hashim Yeop A. Sani J.** (delivering the judgment of the Court): The appellant's claims before the High Court were for damages arising from an accident on April 23, 1975 at a factory of the respondents while appellant was operating a machine which he alleged to be totally different from the one he had been used to work with. As a result of the accident he suffered certain injuries.

- C In the statement of claim the appellant (plaintiff before the High Court) alleged breach or breaches of respondents' statutory duties under the Factories and Machinery Act, 1967 and in the alternative alleged negligence or breach of duty on the part of the respondents as employer under the common law.

- D In their statement of defence the respondents (defendants before the High Court) denied breach of any duty or negligence and alternatively alleged contributory negligence on the part of the appellant.

- E Paragraph 6 of the statement of defence alternatively relied on section 31 of the Employees' Social Security Act, 1969 (hereinafter referred to as "the Act") contending that a contributor under the said Act is barred from receiving or recovering any damages under the common law or any other law for the time being in force. This is the crux of the appeal.

- F When the suit came up for hearing before the learned judge arguments were heard on the preliminary point whether section 31 of the Act is bar to the plaintiff's claim aforesaid. Before the argument both parties had apparently agreed that —

- (a) the plaintiff was an insured person under section 2(2) of the Act;
(b) the machine and the factory came within the Factories Act; and finally
(c) the plaintiff had on October 10, 1977 been paid \$1,935.42 as compensation under the Act.

- G By virtue of Gazette Notification P.U. (B) 385 dated August 15, 1973 certain provisions of the Act came into operation in the Social Security Area of Kota Bharu.

- H After hearing arguments on the preliminary point the learned judge held that section 31 of the Act operates as bar to the claims and therefore dismissed the claims with costs. The plaintiff now appeals.

- I The order of the learned judge dismissing the claims was made on April 12, 1980. Four days later, substantially the same question was raised before the High Court, Kuala Lumpur, in another civil suit (Civil Suit No. 1248 of 1973).⁽¹⁾ In the Kuala Lumpur case the plaintiff's claims for damages had been heard and the third party was found solely to be blamed for the accident. Damages special and general were agreed to at \$120,000 and awarded against the 3rd and 4th defendants. The plaintiff there was an employee of the 4th defendant. The plaintiff's claims against the 1st and 2nd defendants were dismissed

with costs. The question before the court then revolved also around the interpretation of sections 31 and 42 of the Act. The first ground raised on behalf of the plaintiff there was that these two sections are *ultra vires* the Federal Constitution as being discriminatory. This ground was rejected by the court. The second ground raised was whether the plaintiff was entitled to sue the 1st, 2nd, 3rd and 4th defendants in view of sections 31 and 42 of the Act.

For convenience sections 31 and 42 of the Act are reproduced below:—

"31. An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person—

(i) any compensation under the Workmen's Compensation Ordinance, 1952, or

(ii) damages under any other law for the time being in force, in respect of any employment injury sustained as an employee under this Act.

42. When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other written law."

Abdul Hamid J. (as he then was) considered the question before him carefully and in his judgment he set out his conclusions as follows:—

"In my view section 31 clearly prohibits the plaintiff or his dependants from receiving or recovering from his employer damages under any other law in respect of an employment injury sustained by an employee under the Act. The Act has very clearly extinguished the right of an employee to a common law remedy. The pertinent question to consider is whether the words 'any other law' cover the common law. My view is that they do.

The word 'law' has the meaning assigned by Article 160(2) of the Federal Constitution. (Interpretation Act 1967). Article 160(2) of the Federal Constitution defines 'law' to include written law, the common law in so far as it is in operation in the Federation or any part thereof and any custom or usage having the force of law in the Federation or any part thereof'.

Section 42 prohibits an insured person from receiving damages from the employer under any other law other than the common law in respect of an employment injury. The plaintiff clearly became entitled to the benefits provided by the SOCSO Act and is therefore disentitled to receive similar benefit under any other written law."

With respect we whole-heartedly agree with his conclusions.

Although the preliminary point raised by counsel in the present appeal is interesting we were unfortunately not sufficiently assisted by counsel during argument. Among the provisions of the Act which became operative by virtue of Gazette Notification P.U.(B) 384 of 1973 referred to earlier are sections 47 and 84 of the Act. Section 47 deals with the right of the Social Security Organisation to recover from or be reimbursed by the employer where any employment injury is sustained by reason of the negligence of the employer to observe any of the safety rules laid down by or under any written law. Section 84 is one of the provisions under Part V of the Act dealing with adjudication of disputes and claims. Under that Part the Social Security Appeal Board is established and some of the important functions of the Board are set out in subsection (2) of section 84. According to paragraph (c) of subsection (2) claims made under section 47 of the Act referred to earlier

A against the employer or other person liable thereunder shall be decided by the Board. In our view the intention of the Act to exclude the Civil Courts in specific matters is also made abundantly clear under subsections (4) and (5) of section 84 of the Act which read as follows:—

B "(4) No Civil Court shall have jurisdiction to decide or deal with any question or dispute mentioned in sub-sections (1) and (2) or to adjudicate on any liability which by or under this Act is to be decided by the Board.

(5) No Civil Court shall have jurisdiction to decide or deal with any question or dispute which by or under this Act is to be decided by a medical board or by an appellate medical board."

C It is also pertinent to note that when describing the functions of the Social Security Appeal Board, Professor Jain in his Administrative Law of Malaysia and Singapore at page 157 says "No civil court has any jurisdiction to decide any question which falls within the purview of the Board."

D In our judgment the words of section 31 and section 42 of the Act are too clear to cause any ambiguity. Most judges would agree with the *dictum* of Scott L.J. in *Croxford v. Universal Insurance Co. Ltd.*⁽²⁾

"Where the words of an Act of Parliament are clear, there is no room for applying any of the principles of interpretation which are merely presumptions in cases of ambiguity."

E Therefore it is clear that once a person is an insured person under the Act, section 31 and section 42 of the Act constitute a complete bar to any claims against his employer under the common law.

F In his argument before us counsel for the appellant also attempted to persuade us to look at the benefits of the Act as only "temporary measures" and secondly that section 47 of the Act was in effect an "advantage" to the appellant. The learned judge correctly rejected the contention that the benefits under the Act were of a temporary measure. We find nothing in the Act even to suggest that. As regards section 47 of the Act, we are inclined to think, with respect, that counsel misconstrued the provision as the words of that section expressly state that the section deals especially with the right of the Social Security Organisation to recover damages from an employer in cases where any employment injury is sustained by reason of the negligence of the employer to observe any of the safety rules laid down by or under any written law applicable or by reason of any wrongful act of the employer or his agent. That section has nothing to do with the appellant.

H For these reasons we would dismiss the appeal with costs.

Appeal dismissed.

I Solicitors: Wan Mustapha & Co.; Shook Lin & Bok.